In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00166-CV

JOHN P. DEVINE, Appellant

V.

AMERICAN EXPRESS CENTURION BANK, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 08-12-11705-CV

MEMORANDUM OPINION

Appellant, John P. Devine, appeals a summary judgment awarded in favor of American Express Centurion Bank ("Amex"). Devine argues on appeal that the trial court should have referred the matter to arbitration, he was denied proper notice of the summary judgment proceeding, and fact issues preclude summary judgment in favor of Amex. We affirm in part and reverse in part.

BACKGROUND

Amex filed suit against Devine for breach of a credit card agreement. Amex alleged that under the terms of the agreement it made cash advances to Devine, either as actual cash or in payment for purchases made by Devine from third parties, and that Devine failed to repay the advances in accordance with the agreement. Amex alleged Devine owed a balance of $21,949.37 and that Devine failed and refused to pay the balance owed.

Amex filed a motion for summary judgment on its breach of contract claim. In support of its motion, Amex attached a copy of the alleged credit card agreement between Amex and Devine, a series of monthly statements, and an affidavit of an attorney employed by Amex. Devine filed a response to Amex's motion for summary judgment, wherein he objected to Amex's exhibits and the attorney's affidavit. Devine argued that Amex failed to present any competent summary judgment evidence establishing that the agreement it submitted as evidence was the actual agreement between the parties. Devine further argued that his affidavit raised a fact issue with regard to the agreement between the parties and reasonable and necessary attorney's fees. In support of his response, Devine submitted his own affidavit. The motion was considered by submission and the trial court entered summary judgment in favor of Amex and ordered that Amex recover $21,763.75, as the balance due under the agreement, and $2,100 in attorney's fees.

Following the court's judgment, Devine filed a motion for new trial and in the alternative, motion to compel arbitration. Devine's motion was overruled by operation of law and this appeal followed. In three issues Devine argues (1) the trial court improperly refused to refer the case to arbitration, (2) the trial court improperly granted summary judgment before the date set for the summary judgment hearing, and (3) the trial court improperly granted summary judgment because genuine issues of material fact existed.

ISSUES ONE AND TWO

Devine's first issue concerns an arbitration clause set forth in the cardmember agreement. Devine asserts in issue one that the trial court "improperly refused to refer this case to arbitration." It is undisputed that Amex's motion for summary judgment was set for submission on January 8, 2010.[1] However, the court granted the summary judgment on January 6, 2010, two days prior to the submission date. Devine contends that he "intended to file a motion to compel arbitration" and that he was deprived of the opportunity to do so because the court ruled on the motion for summary judgment two days early. Devine further contends that the trial court "refused to rule" on his motion for new trial and alternative motion to compel arbitration. Devine argues that because the agreement at issue contained an arbitration clause, "all of the necessary elements to

[1] In his brief, Devine contends that the summary judgment motion was set for submission on January 8, 2009, as opposed to January 8, 2010. However, the record reflects that the motion for summary judgment was filed on November 24, 2009, and Devine's response was filed on January 1, 2010.

compel arbitration were before the Court;" thus, "it was error for the trial court to refuse to order this matter to arbitration[.]"

Devine did not assert that the dispute was subject to an arbitration agreement until he filed his motion for new trial following the court's entry of summary judgment.[2] He waived any right to arbitration by permitting the trial court to adjudicate the issue first. Generally a party may not choose to litigate, and then when dissatisfied with the result, ask for arbitration. Furthermore, pursuant to Rule 166a(c) of the Texas Rules of Civil Procedure, "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal[]" of a summary judgment. Tex. R. Civ. P. 166a(c); *see also City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 675 (Tex. 1979) (holding Clear Creek was precluded from urging issues not presented to the trial court as a basis for reversal of the trial court's summary judgment). To the extent Devine argues on appeal that the summary judgment was improper because the dispute was subject to an arbitration agreement, this is not a proper ground upon which we may reverse the trial court's summary judgment. *See* Tex. R. Civ. P. 166a(c); *Clear Creek Basin Auth.*, 589 S.W.2d at 675. We overrule issue one.

In issue two, Devine argues that the trial court granted Amex's motion for summary judgment two days before the hearing date, "depriving [Devine] of the opportunity to file a motion to compel arbitration." Devine further contends that the trial

[2] No argument was asserted in the motion for new trial that the arbitration clause was newly discovered evidence.

court's early ruling violated the twenty-one day notice requirement set forth in Rule 166a(c) and deprived Devine of due process. Devine's reliance on the notice provisions set forth in Rule 166a(c) is misplaced. Rule 166a(c) provides in pertinent part:

> Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response.

Tex. R. Civ. P. 166a(c). Amex did not set its motion for summary judgment for hearing. The trial court set the summary judgment for submission without an oral hearing on January 8, 2010. The trial court granted the summary judgment on January 6, 2010, two days before its scheduled submission date. Amex's motion and all supporting affidavits were served on Devine on November 24, 2009. Therefore, Devine was provided twenty-one days' notice of the movant's motion and supporting affidavits as required by Rule 166a(c).

Devine filed his response to the motion for summary judgment on January 1, 2010. While Devine argues that he intended to raise the arbitration issue between January 6, 2010, and January 8, 2010, Devine was required to have his written response on file at least seven days prior to the day of hearing. *See* Tex. R. Civ. P. 166a(c). Therefore, Rule 166a(c) precluded Devine from further responding to the motion for summary judgment without leave of court. *See id.* Devine was given proper notice of

Amex's motion for summary judgment and filed a response and supporting affidavit that was considered by the trial court. We overrule issue two.

ISSUE THREE

In issue three, Devine argues generally that genuine issues of material fact exist that preclude summary judgment in this case. Specifically, Devine argues that the affidavit provided by Amex in support of its attorney's fees was conclusory. Because Devine has asserted a general complaint that fact issues preclude summary judgment, we will also address the trial court's judgment on the merits. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970).

We review the trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In a traditional motion for summary judgment, the movant has the burden to show that no genuine issues of material fact exist and that judgment should be granted as a matter of law. Tex. R. Civ. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). We review the evidence in the light most favorable to the nonmovant and indulge all reasonable inferences in favor of the nonmovant. *Dorsett*, 164 S.W.3d at 661.

Judgment on the Merits

Devine executed an affidavit that was submitted in support of his response to Amex's motion for summary judgment. Devine argues that his affidavit contradicts Amex's summary judgment evidence, precluding summary judgment.

In support of its motion for summary judgment, and along with a copy of the purported agreement and a series of monthly statements from Amex to Devine, Amex submitted the affidavit of an attorney employed by Amex. The affidavit stated that the attorney was employed by Amex, he was competent to make the affidavit, was authorized to execute the affidavit on behalf of Amex, and the statements made therein were within his personal knowledge. The attorney's affidavit laid the foundation for the business records exception to the hearsay rule for the records submitted in support of the motion for summary judgment. The affiant further stated as follows:

> A true and correct copy of the applicable Agreement between AMEX and [Devine] is attached hereto as Exhibit "A" and incorporated herein. Under the Agreement, AMEX made cash advances to [Devine], either as actual cash or in payment for purchases made by [Devine] from third parties. [Devine] accepted each advance and under the Agreement became bound to pay AMEX the amounts of such advances, plus additional charges. The Agreement provides that [Devine] may object to any disputed charges, in writing and within sixty (60) days of notice of the charge. [Devine] made no objections to any of the charges included in the balance within that time period.
>
> [Devine] has failed to repay all the advances made under the Agreement. There is a balance of $21,763.75 owing on [Devine's] account[.]

In the affidavit submitted in support of his response, Devine stated in part:

> . . . I did not receive the agreement attached to Plaintiff's summary judgment. I specifically dispute the attached agreement as it was not the terms and conditions represented to me as the operative terms and conditions. Plaintiff fraudulently charged [an] additional interest rate never agreed upon. Further, my agreement with Plaintiff was for a different interest rate than Plaintiff is now attempting to charge. I have requested an accounting from Plaintiff but Plaintiff has refused to provide said

> accounting of the charges they now seek to bill me. I never agreed to waive all my rights simply by not putting in writing within 60 days a specific challenge to Plaintiff's bill when Plaintiff refuses to provide a detailed accounting of the charges and to properly account for the interest.

The agreement attached as "Exhibit A" to Amex's motion for summary judgment is entitled "Agreement Between Cash Rebate Cardmember and American Express Centurion Bank, FSB." The agreement states, "[w]hen you keep, sign or use the Card issued to you (including any renewal or replacement Cards), or you use the account associated with this Agreement (your "Account"), you agree to the terms of this Agreement." The evidence establishes that Devine is an "American Express Cash Rebate Credit Card" holder. Though Devine argues that he never received the agreement, courts have held that delivery of an agreement is shown when the parties manifest an intent through their actions and words that the contract become effective. *Winchek v. Am. Express Travel Related Servs. Co.*, 232 S.W.3d 197, 204 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

In *Winchek*, the defendant, Winchek, argued that the trial court's grant of summary judgment in favor of Amex was improper because Amex failed to prove it ever delivered the agreement to her. *Id.* The court concluded that Winchek's "conduct in using the card and making payments on the account for the purchases and charges reflected on her monthly billing statements manifested her intent that the contract become effective." *Id.* Winchek further argued that Amex failed to show proof of her acceptance of the terms of the agreement. *Id.* In holding that Amex met its burden to conclusively

establish an agreement between Amex and Winchek, the Court found significant that the agreement expressly stated that use of the card constituted acceptance of the terms set forth in the agreement, and that Winchek did not dispute that she had used the card. *Id.* In addition, the court noted that Winchek made payments each month without ever disputing the accuracy of the statements or the stated terms. *Id.*

Amex provided evidence by affidavit that the agreement attached as "Exhibit A" was the operative agreement between Amex and Devine. Amex also provided balance statements from December 2007 through August 2008 showing that Devine used the "American Express Cash Rebate Card" issued by Amex and made payments on the account. On this record, Devine's statement that he did not receive the agreement is insufficient to raise a fact issue regarding the existence of an agreement between the parties. *See id.*; *see also Ghia v. Am. Express Travel Related Servs.*, No. 14-06-00653-CV, 2007 WL 2990295, at *3 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, no pet.) (mem. op.) ("Because appellant used her card and made some payments due, she manifested intent that the agreement become effective, irrespective of whether she received manual delivery.").

Additionally, we conclude that the evidence submitted by Amex is sufficient to establish the agreement was breached and Amex incurred damages in the amount of $21,763.75. Devine asserts in his affidavit that he did not agree to pay the interest charged by Amex. However, the cardmember agreement specifically states how the

finance charges will be calculated. Additionally, each monthly statement submitted as evidence also sets forth the method of calculating finance charges. The evidence submitted by Amex also includes a "Notice of Changes" to the cardmember agreement, prepared for Devine, which explained that for credit card accounts opened prior to February 15, 2008, the standard APR for purchases was changing to the "Prime Rate plus 9.99%." The notice explained that this was a variable rate and that it would become effective with billing periods beginning on or after May 1, 2008.

In response to the motion for summary judgment, Devine did not present evidence negating receipt of the balance statements or Notice of Changes regarding the finance charges. There is no evidence in the record that Devine disputed the credit card charges prior to Amex's attempt to collect the outstanding balance. Based on this record, we conclude the trial court did not err in granting summary judgment for the balance owed under the agreement. *See Ghia*, 2007 WL 2990295, at **2-3; *Winchek*, 232 S.W.3d at 204.

Attorney's fees

Devine argues on appeal that the trial court erred in overruling his objections to Amex's summary judgment proof "because said proof was conclusory." Specifically, Devine argues the affidavit Amex submitted in support of its request for attorney's fees is conclusory. Devine argues that the affidavit is insufficient to support the award of fees because it "did not itemize the hours expended, or identify the attorney's hourly rate."

Devine further contends that the absence of an hourly rate and hours billed prevents the affidavit from being readily controvertible. Additionally Devine contends that his own affidavit contradicted Amex's affidavit in support of requested attorney's fees.

Amex submitted the affidavit of its counsel of record in support of its request for attorney's fees. Counsel averred that he was attorney of record for Amex in the underlying suit and that the statements set forth therein were based on his personal knowledge. Counsel further stated that he was familiar with the fees charged by attorneys for work of the type performed in this case and stated the following in support of Amex's request for $2,100 in attorney's fees:

> Prior counsel and I have represented Plaintiff in its pursuit of collection [of] the indebtedness which is the subject of this cause. Prior counsel and I have reviewed the documentation provided by Plaintiff regarding the indebtedness, prepared pleadings, performed necessary and appropriate research, prepared appropriate discovery requests, and prepared a Motion for Summary Judgment and appropriate supporting affidavit(s). All the work done in this cause has been necessary. It is my opinion that Plaintiff is entitled to recover its attorney fees in accordance with the terms of the Agreement and Texas law, in the sum of $2,100.00 in view of the work performed to date in order to collect the judgment.

In this affidavit filed with his response motion, Devine stated:

> . . . I am a licensed attorney in the State of Texas. I am familiar with the usual and customary rates charged by attorneys in Texas. I have reviewed the attorney's fee affidavit attached to Plaintiff's motion for summary judgment. The affidavit does not contain the hourly rate being charged by the attorney's billing nor does it contain the number of hours billed. In addition, the affidavit does not discuss any of the Arthur Anderson factors. As such, the attorneys' fees are not readily controverted. In reviewing the facts supplied by Plaintiff to recover attorney's fees, it is my opinion that the fees sought are unnecessary and not reasonable. The

> entire lawsuit could have been avoided had Plaintiff supplied the necessary information previously requested. It is my expert opinion that the attorney fees Plaintiff's attorney claims are not necessary or reasonable.

The reasonableness of attorney's fees is generally a question of fact. *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009); *Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc.*, 754 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1988, writ denied). However, an attorney's affidavit may be sufficient to conclusively establish the reasonableness of attorney's fees for purposes of summary judgment. *Basin Credit Consultants, Inc. v. Obregon*, 2 S.W.3d 372, 373 (Tex. App.—San Antonio 1999, pet. denied). "[A]n affidavit filed by the movant's attorney that sets forth his qualifications, his opinion regarding reasonable attorney's fees, and the basis for his opinion will be sufficient to support summary judgment, if uncontroverted." *In re Estate of Tyner*, 292 S.W.3d 179, 184 (Tex. App.—Tyler 2009, no pet.) (citing *Basin Credit Consultants*, 2 S.W.3d at 373). To establish that attorney's fees are reasonable as a matter of law, uncontroverted testimony of an interested witness must (1) be capable of ready contradiction if untrue; (2) be clear, direct, and positive, and (3) be free of circumstances tending to discredit or impeach the testimony. *Rosenblatt v. Freedom Life Ins. Co. of Am.*, 240 S.W.3d 315, 321 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)).

We conclude the affidavit submitted by Amex fails to satisfy its summary judgment burden. *See* Tex. R. Civ. P. 166a(c). Though counsel for Amex states that all

work performed on the case was necessary, on its face, the affidavit filed by Amex does not state an opinion that the requested fees were reasonable or otherwise provide basic objective criteria to substantiate the amount of attorney's fees requested. It is unclear from Amex's supporting affidavit whether the requested fees were based on an hourly rate for the work performed or based on a percentage of the judgment. Devine's affidavit challenges the sufficiency of Amex's supporting affidavit and states his opinion that the requested fees are not reasonable. We note that an affidavit that merely criticizes the fees sought by the movant as unreasonable without setting forth the affiant's qualifications or the basis of his opinion will not be sufficient to defeat conclusive summary judgment evidence of reasonable fees. *See Basin Credit Consultants*, 2 S.W.3d at 373. However, the evidence presented by Amex is not conclusive evidence of reasonable fees. Additionally, while Devine's affidavit appears conclusory, it controverts the evidence presented by Amex on attorney's fees. Under these circumstances, we find the trial court erred in granting summary judgment on attorney's fees. *See Rosenblatt*, 240 S.W.3d at 320-21; *see also Gen. Elec. Supply Co. v. Gulf Electroquip, Inc.*, 857 S.W.2d 591, 601-02 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (holding summary judgment on attorney's fees is improper when conflicting affidavits from opposing attorneys are presented).

We sustain issue three in part. We sever the issue of attorney's fees from the judgment, reverse the award of attorney's fees, and remand for further proceedings on attorney's fees. We affirm the remainder of the trial court's judgment. *See id*. at 602.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

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CHARLES KREGER
Justice

Submitted on March 30, 2011
Opinion Delivered July 14, 2011

Before Gaultney, Kreger, and Horton, JJ.